Liability for the violation of Human Rights and labour standards in Global Supply Chains

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Liability for the Violation of Human Rights and Labour Standards in Global Supply Chains: A Common Law Perspective

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Abstract: Where there have been violations of labour standards or human rights by organisations operating overseas, but such entities are either owned or controlled by a transnational corporation ('TNC') based in a Common Law system such as England and Wales, the current position in company, tort, contract and private international law is that the right of injured overseas workers (of those overseas entities) or citizens to recover the losses they have suffered from TNC is negligible to zero. This is startling in light of policies underpinning product liability and private laws. The question is whether modifications of existing private and company law doctrines could facilitate a change in the position whereby transnational corporations are held liable. Other possibilities for addressing the TNC accountability gap are also discussed.

I Introduction

Any European legal system that (i) fails to recognise the liability of a transnational enterprise located at the top of a corporate group or global supply chain, where its activities are negligent or constitute an infringement of human rights norms and are directly responsible for the serious injury or death of the employees of a third party or the general public on the same territory as its registered office or (ii) erects barriers to such individuals securing access to justice, is one that would attract the opprobrium and criticism of all right-thinking lawyers; and rightly so. However, where such injury or death occurs on the soil of another territory where labour standards and human rights norms are weak and the relevant activities are routed through a separate legal entity located in that jurisdiction, the tendency is to shrug the shoulders and mutter that there is little that can be done, even though the entity which is legally responsible for the careless and negligent con-

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duct that has caused the relevant misfortunes is one that is directly or indirectly controlled by a transnational corporation located in a European legal system where labour and human rights standards are high. Therein lies a paradox, since it is generally accepted that the policy factors favouring the recognition of liability of such a multinational business for overseas labour and human rights violations are particularly strong, tending to outweigh the opposing arguments. The challenge lies in the fact that the doctrines of the private and company laws of European legal systems have lagged well behind the received currency of those policy considerations.

In this article, the UK is taken as an example of one of those European legal systems, in order to provide a particularly Common Law perspective. Like other European countries, the legal system in the UK – which is grounded in the Common Law tradition – has traditionally rejected or been slow to develop the requisite doctrinal tools that are available in its armoury to enable such liability to be imposed on such transnational corporations. Of course, the question is whether there is any way in which such existing instruments can be bent into shape to reflect and realise the compelling policy considerations pointing towards the imposition of liability of multinational companies located in the UK.[1] That is a question to which this article is devoted, and as will be noted, recent developments show glimpses of some (albeit conditional and limited) promise in that direction.

In this article, the principles in the law of tort and contract, as well as company law and private international law in the territories of England and Wales, Scotland and Northern Ireland that are relevant to this topic will be taken as a proxy for the 'Common Law'. In the third section, these rules will be described in order to provide an up-to-date account of the scope for liability to be imposed on multinationals that are parent companies or positioned at the upper tier of a global supply chain. A summary of the main doctrinal challenges will then be presented. At that point, the discussion will turn to a survey of the possible adapta-

1 For discussion generally on the imposition of liability on transnational corporations for human rights violations of their subsidiaries or entities in a supply chain, see *K McCall-Smith*/*A Ruhmkorf*, Sustainable Global Supply Chains: From Transparency to Due Diligence, in: C Gammage/T Novitz (eds), Sustainable Trade, Investment and Finance: Towards Responsible and Coherent Regulatory Frameworks (2019); *K McCall-Smith*/*A Ruhmkorf*, From International Law to National Law: The Opportunities and Limits of Contractual CSR Supply Chain Governance, in: V Ulfbeck/A Andhov/K Mitkidis (eds), Law and Responsible Supply Chain Management: Contract and Tort Interplay and Overlap (2019) 15 and *K McCall-Smith*/*A Ruhmkorf*, Reconciling Human Rights and supply chain management through corporate social responsibility, in: V Ruiz Abou-Nigm/K McCall-Smith/D French (eds), Linkages and Boundaries in Private and Public International Law (2018) 147–174.

tions that could be made to the law to strike a much fairer allocation of responsibility, before concluding. But first, the following section will set the scene by providing an illustration of the classic set of fact patterns where human rights and labour standards are violated in an overseas territory.

II The paradigm example of a human rights and labour standards violation

The paradigm example where compelling policy factors favour the imposition of liability involves a transnational or multinational company (TNC or MNC) A whose registered office or principal place of business is in a home jurisdiction situated in the global north or west, eg the UK. Being a highly mobile entity engaged in commercial business worldwide, the TNC A will seek to push down the costs of production of its products or services as much as is practically possible. For example, it will source the labour necessary for the manufacture of its products from territories throughout the world where labour costs are low. More often than not, the chosen jurisdiction will be based in a territory located in the global south, which we will call 'Ruritania' for the want of a better name. The TNC A may also seek to secure raw materials, such as copper ore, indium, tantalum, etc, which are scarce. Once again, for the sake of argument and simplicity, let's say that the relevant jurisdiction where these minerals are found is Ruritania. Of course, it is well known that companies such as TNC A operating at the vanguard of the knowledge economy may structure their global production processes in a way that gives rise to a corporate group structure,[2] with overseas subsidiaries B1, B2, B3, etc, specifically incorporated in Ruritania. In this way, the industrial organisation of the TNC A is naturally oriented towards the vertical integration of production,[3] where *bureaucratic controls* inherent within the group are harnessed to

2 For discussion of corporate groups, see *T Hadden*, Regulating Corporate Groups: An International Perspective, in: J McCahery/S Picciotto/C Scott (eds), Corporate Control and Accountability: Changing Structures and Dynamics of Regulation (1993) 343; *J Dine*, Governance of Corporate Groups (2000); *PI Blumberg/KA Strasser/NL Georgakopoulos*, The Law of Corporate Groups (2007) and *C Witting*, The Liability of Corporate Groups and Networks (2018).

3 See *OE Williamson*, The Organization of Work, (1980) Journal of Economic Behavior and Organisation 5, 25; *SJ Grossman/OD Hart*, The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration, (1986) 94 Journal of Political Economy 691; *Oliver E Williamson*, The Economic Institutions of Capitalism – Firms, Markets, Relational Contracting (1985) 60f; and *H Collins*, Regulating Contracts (1999) 163.

direct and allocate resources and execute corporate decision-making.[4] The alternative option is to adopt a vertically disintegrated structure[5] where the necessary manufacturing labour and raw materials are sourced from third party suppliers BA1, BA2, BA3, etc, contractors BB1, BB2, BB3, etc, and sub-contractors BC1, BC2, BC3 operating at one or more steps removed from the TNC A which are based in the overseas jurisdiction. This entails the TNC A engaging in global supply chain management, whereby the TNC A concludes a series or chain of commercial contracts or arrangements or policies with each of its suppliers BA1, contractors BB1, or sub-contractors BC1 in Ruritania. It is not uncommon that human rights and labour standards are woefully inferior, or access to justice is impaired, in Ruritania, in comparison with those legal protections recognised in the home jurisdiction of TNC A: such is the way of the world. It is also important to stress that unlike corporate groups, the control exerted by the TNC A over its arms-length suppliers BA1, contractors BB1, or sub-contractors BC1 is not bureacratic but *avowedly contractual* in nature. In essence, it is the terms of the commercial contract that are tailored (by pressing the totemic doctrine of freedom of contract into service) to provide TNC A with the requisite bargaining power to subordinate the suppliers BA1, contractors BB1, and sub-contractors BC1 to its will. In this way, the *bureacratic control* wielded by TNC A in the case of a corporate group structure that is conferred by corporate law is substituted for *legal contractual controls* in the case of global supply chain management systems.

Where death or injury is caused to individuals and/or workers C by those arms-length suppliers BA1, contractors BB1, or sub-contractors BC1, in the supply chain, the queston is whether there is scope for TNC A liability in the UK as the home state, since the barriers to justice experienced by the injured workers or citizens C in the host state Ruritania may be formidable, and the private law inadequately developed or unsophisticated. The same point is equally applicable where TNC A has organised its affairs through a corporate group. In this situation, it would be overseas subsidiaries B1, B2, or B3, etc specifically incorporated in the host state territories that had caused the injury or death of the workers or citizens C.

In recent years, the frequency with which TNCs A have incorporated CSR policies or codes of conduct into their commercial contracts or arrangements with their overseas partners has gathered apace. Those codes of conduct will often impose obligations on TNC A's subsidiaries B1, or suppliers BA1, contractors BB1, or

4 See *H Collins*, Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws (1990) 10 Oxford Journal of Legal Studies 353, 362 for the distinction between bureaucratic and contractual control mechanisms.

5 *Andrew L Friedman*, Industry and Labour (1977) 114–129.

sub-contractors BC1.[6] It may bind them to adhere to soft law norms, such as the labour standards promulgated by the International Labour Organization (ILO).[7] Likewise, the obligations may cover respect for human rights, consisting of norms issued by the UN Global Compact,[8] the European Convention on Human Rights (ECHR),[9] Universal Declaration of Human Rights (UDHR),[10] Organisation for Economic Cooperation and Development (OECD),[11] the United Nations (UN) (UN Guiding Principles on Business and Human Rights)[12] and/or the Organisation for Security and Cooperation in Europe (OSCE) (prevention of trafficking in human beings for labour exploitation in supply chains).[13] TNC A may also decide to incorporate codes of conduct that are based on regulations promulgated at the national law level to address the violation of basic protection standards of supply chains.[14] These contractually binding codes of conduct will cover transgressions from the payment of substandard wages to more extreme wrongdoing, such as unsafe workplace conditions, modern slavery, child labour and forced labour.

III Private law

The law regulating tort, companies and contracts, as well as private international law in the UK as the home state of the TNC A will play a central role in determining whether the injured host state employees or citizens C will have a legal claim against the TNC A. In the following sections, each of these areas of law are scrutinised to identify their main weaknesses and any recent developments which

6 See *McCall-Smith/Ruhmkorf*, Reconciling Human Rights (fn 1) 147–174 and *McCall-Smith/Ruhmkorf*, From International Law to National Law (fn 1) 15.

7 See <https://www.ilo.org/global/standards/lang–en/index.htm> (last visited 20 May 2019). For an overview of the standards-related work of the ILO, see 'Rules of the Game' available at <https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_672549.pdf> (last visited 20 May 2019).

8 See the ten principles at <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited 20 May 2019).

9 See <https://www.echr.coe.int/Documents/Convention_ENG.pdf> (last visited 20 May 2019).

10 See <https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf> (last visited 20 May 2019).

11 See <https://www.oecd.org/about/> (last visited 20 May 2019).

12 See <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> (last visited 20 May 2019).

13 See <https://www.osce.org/secretariat/237571> (last visited 20 May 2019).

14 Eg California: California Transparency in Supply Chains Act of 2010, United Kingdom: Modern Slavery Act 2015, France: Loi Rana Plaza.

may cause us to pause and ask if the potential for TNC A liability is beginning to emerge.

A Tort law

In Common Law systems, the judiciary have harboured a long-standing reluctance to adapt the rules of tort law to recognise liability in such circumstances if there is the potential for 'indeterminate liability' to third parties. This is known as the 'floodgates' argument. And it is a very common theme when courts reject the case for an extension in the frontiers of liability in tort. Where a tort has been committed by a subsidiary or supplier, the technique for the achievement of such a result is to say that the TNC A has itself committed no actionable wrong. The Common Law clings to the doctrine of separate legal personality in company law,[15] which serves as a useful tool in that regard. In principle, where the TNC A is the parent company of an overseas subsidiary B1, it is theoretically possible to pierce the corporate veil to confer a right of recovery in favour of C against TNC A where B1 is liable to C.[16] This is rooted in the idea that TNC A owns the shares of, and thus controls, subsidiary B1 and the veil of incorporation ought to be penetrated to clothe the former with liability. However, the doctrine of separate legal personality is so impregnable that any exceptions to its functioning that are recognised by the Common Law are very narrow indeed. The courts will only disregard the doctrine that the overseas subsidiary B1 is a separate legal entity where it has been specifically created to conceal the real actors that lie behind TNC A,[17] or to enable TNC A to evade any of its existing legal obligations or crystallised liabilities.[18] Seen from this perspective, tort law would appear to be subordinate to (this central doctrine of) company law.[19] This discussion accentuates the fundamental point that the Common Law treats corporate groups as nothing sinister and as a wholly natural way to structure commercial operations, unless the overseas subsidiary company B1 has been set up specifically as a means of giving the parent company A the potential to circumvent its legal duties. For the reason that

15 *Salomon v Salomon & Co Ltd* [1897] Appeal Cases (AC) 22.

16 However, this would not be relevant in the case where the TNC A operated through a global supply chain, since there would be no corporate veil to pierce in the case of suppliers BA1, contractors BB1 or sub-contractors BC1.

17 *Prest v Petrodel Resources Ltd*. [2013] 2 AC 415, 484C-F per Lord Sumption.

18 Ibid.

19 See the discussions concerning the relationship between tort and company law in the chapters in *CEF Rickett/R Grantham*, Corporate Personality in the 20th Century (1998).

B1's liability to C is only likely to arise after the event, this is very seldom the case. For example, in *Adams v Cape Industries*,[20] the liability of a parent company to victims of asbestos was rejected where they had a judgment from the court of a state in the US against one of its overseas subsidiaries and the latter had been incorporated well in advance of the crystallisation of those liabilities to the victims.

We now turn back to the fundamental question of whether there is scope for TNC A to be liable in UK tort law to the injured workers or citizens C where the relevant loss has been sustained as a result of the actions or conduct of TNC A's overseas subsidiary B1 or an overseas supplier BA1, contractor BB1, or sub-contractor BC1. Here, we must draw a distinction between primary liability and vicarious liability in tort for negligence. As regards the potential for primary liability, for the reasons given above, this was traditionally limited. But we have recently witnessed a resurgence in tort law in the UK as a result of the decision in the English Court of Appeal in *Chandler v Cape plc*,[21] which was recently explained by the UK Supreme Court in *Vedanta Resources plc v Lungowe*.[22] In many respects, this socially progressive adaptation of the law of negligence in UK tort law has been achieved at the expense of company law to the extent that it functions to soften (or some might argue, outflank) the rigidity of the doctrine on piercing the corporate veil. Here, it was held that there is nothing special about a parent and subsidiary case in the law of tort as regards the appropriate test for the imposition of a primary duty of care in negligence. The relevant tests to be met are as follows, which will also apply to subject TNC A to liability for losses caused to third party employees or citizens C in the supply chain context, ie where they are caused by an arms-length supplier BA1, contractor BB1 or sub-contractor BC1, etc:

1. TNC A and the overseas corporation B1 (that has caused the relevant loss to C) must be in a relevant respect the same businesses;
2. TNC A must have, or should have, superior knowledge on some relevant aspects of health and safety in the relevant industry;
3. The overseas corporation B1's system of working in the overseas jurisdiction is unsafe, as the TNC A must have known, or ought to have known; and
4. TNC A knew or ought to have foreseen that the overseas corporation B1, its employees or the third party citizens C would rely on TNC A actively deploying its superior knowledge to protect C. Where there is evidence of TNC A

20 [1990] Law Reports, Chancery Division (Ch) 433.

21 [2012] 1 Weekly Law Reports (WLR) 3111.

22 [2019] United Kingdom Supreme Court (UKSC) 20, [2019] 2 WLR 1051.

> intervening in, or controlling, the trading operations of overseas company B1, eg in respect of production or funding, this criterion will be satisfied.[23]

In *Vedanta*, the Supreme Court clarified the legal position post-*Chandler* by explaining that the above criteria should not be treated as if they have statutory force but instead as a useful set of particular illustrations as to when a duty of care may be said to arise.[24] To that extent, circumstances in which a duty of care may arise ought not to be limited to the four criteria above. Instead, a broader range of circumstances grounded on supervision, control, intervention, and assumption of the relevant risks by TNC A will give rise to a primary duty of care. As for the requisite level of control or intervention on the part of TNC A at 4 above, Lord Briggs in *Vedanta* was of the view that this could be demonstrated where (i) guidelines are promulgated by TNC A to reduce the environmental impact of operations, but these contain systemic errors that result in harm to workers or citizens such as C when they are put into effect by A's overseas subsidiary B1 or overseas supplier BA1, contractor BB1, or sub-contractor BC1,[25] (ii) TNC A takes active steps to ensure that A's overseas subsidiary B1 or overseas supplier BA1, contractor BB1, or sub-contractor BC1 implements a policy through training, supervision and enforcement,[26] and (iii) TNC A assumes responsibility to the injured workers or citizens C through, for example, publishing various materials in which A is held out as exercising a degree of supervision and control over its overseas subsidiary B1 or overseas supplier BA1, contractor BB1, or sub-contractor BC1.[27]

Despite the promise inherent within this development in tort law in the UK, experience has shown that many cases fall down on one or more of the above four limbs. For example, in *AAA v Unilever plc*,[28] the employee and resident claimants C were unable to establish that A had intervened in the business operations of B1 to such an extent that limb 4 was met, ie the requisite reliance by C on TNC A. TNC A had not integrated its operations with that of B1 and had not given any particular advice to B1 about the management of a particular risk. Likewise, in *Thompson v Renwick Group Plc*,[29] it was held that the decision of TNC A to appoint a health and safety director to the board of the overseas subsidiary B1 did not give rise to a duty of care to employees C of subsidiary B1 on the basis that this was insufficient

23 [2012] 1 WLR 3111, 3131F-H at paras [80]–[81] per Arden LJ.
24 [2019] UKSC 20, [2019] 2 WLR 1051, 1069H per Lord Briggs.
25 [2019] UKSC 20, [2019] 2 WLR 1051, 1068F-G per Lord Briggs.
26 [2019] UKSC 20, [2019] 2 WLR 1051, 1069A per Lord Briggs.
27 [2019] UKSC 20, [2019] 2 WLR 1051, 1069B per Lord Briggs.
28 [2018] Court of Appeal, Civil Division (EWCA Civ) 1532, [2018] British Company Case (BCC) 959.
29 [2015] BCC 855.

to give rise to the requisite intervention or control in its operations in terms of limb 4 above. In essence, if the operations of A and B1 are co-ordinated or intermingled, that will not be enough, as limbs 3 and 4 will remain unfulfilled. Furthermore, even though TNC A may produce a corporate group human rights due diligence policy based on the aforementioned UN Guiding Principles[30] or a broadly equivalent labour standards due diligence policy, which it renders applicable to dealings by its overseas subsidiaries B1, or overseas supply chain partners (such as suppliers BA1, contractors BB1 or sub-contractors BC1), such policies will be couched in purely aspirational language, or confined to processes and procedures that TNC A and its subsidiaries and supply chain partners will adopt or pursue, rather than speak to the achievement of specific outcomes. It is unlikely that such a form of communication in TNC A's corporate group human rights or labour standards due diligence policy will be sufficient to trigger the recognition of liability for the breach of a primary duty of care in the Common Law of negligence, as the requisite level of intervention, supervision or control by TNC A will be absent. Written statements in policies confirming how TNC A and its overseas subsidiaries or overseas supply chain partners will seek to implement systems designed to either prevent or reduce instances of labour standards or human rights violations lack the edge that is necessary to engage a duty of care post-*Vedanta*.

A completely disparate issue concerns the potential for TNC A to be held vicariously liable for the tortious and negligent conduct of overseas corporation B1. In UK law, this requires satisfaction of the factors that were adumbrated by Lord Reed in the UK Supreme Court in its decision in *Cox v MoJ*.[31] First, it must be demonstrated that harm was wrongfully done by subsidiary B1, or supplier BA1, contractor BB1 or sub-contractor BC1, which is engaged in activities as an integral part of the commercial activities carried on by TNC A and for the latter's benefit, rather than those activities being wholly attributable to the conduct of a recognisably independent business of B1's own or that of a third party. If this criterion is satisfied, it is also a requirement that the commission of the wrongful act is a risk that was created by TNC A assigning those activities to corporation B1. As such, the first factor involves establishing that the business of corporation B1 is integrated with the commercial operations of TNC A. It is on this limb that a great multitiude of vicarious liability claims by injured employees or citizens C against TNC A will falter. The main challenge posed by the *Cox* test is that vicarious liabi-

30 UN Guiding Principles on Business and Human Rights: see <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> (last visited 20 May 2019).

31 [2016] UKSC 10; [2016] AC 660, 670E-G at para [24].

lity will only apply to impose liability on TNC A if the overseas subsidiary B1 or local supplier BA1, contractor BB1, or sub-contractor BC1, *do not* function as independent or autonomous business operations. This will demand an analysis of the operational capacities and capabilities of both organisations, but it would be unusual for a subsidiary or local supplier or contractor to be so integrated with the operations of TNC A that they were either dependent on TNC A or de facto one and the same business. For that reason, the law of vicarious liability in the Common Law is unlikely to offer much success to the injured employees or citizens C.

B Contract law

Having thrown some sand in the machinery, or expressed a degree of caution at least, as regards the scope for establishing primary or vicarious liability in the tortious law of negligence, at this juncture, a separate line of enquiry concerns the ability of contract law to offer C relief from TNC A. Contract law is a particular site of relevance in this enquiry, since the discussion earlier in this article identified the growing frequency with which TNCs are expressly incorporating Codes of Conduct into their commercial contracts with partners in their supply chains. Those Codes will include references to CSR, labour standards and human rights frameworks that impose expectations about the behaviour of those supplier partners when they conduct activities in the overseas jurisdiction.[32] In such a case, the question arises as to whether it would be possible for third parties such as injured employees or citizens C to establish a form of legal recourse under such Codes of Conduct. The principal factor in Common Law countries, which has traditionally constituted an obstacle to parties such as C, is the extent to which they cling to the doctrine of privity of contract. The privity of contract doctrine excludes the scope for third parties to have recourse under a bilateral contract concluded between TNC A and overseas subsidiary B1 or local overseas supplier BA1, contractor BB1, or sub-contractor BC1. The main objective of the privity doctrine is twofold: first, to insulate contracting parties such as TNC A and B1, BA1, BB1 or BC1 from liability to third parties C; and secondly, to ensure that third parties C are not encumbered under contracts to which they were not a party.[33] On this basis, the potential for contract law to play any role does indeed seem scant.

32 See *McCall-Smith/Ruhmkorf*, Sustainable Global Supply Chains (fn 1); *McCall-Smith/Ruhmkorf*, From International Law to National Law (fn 1) 15 and *McCall-Smith/Ruhmkorf*, Reconciling Human Rights (fn 1) 147–174.

33 *Sir Anthony Mason*, Privity – A Rule in Search of Decent Burial? in: P Kincaid (ed), Privity: Private Justice of Public Regulation (2001) 88 at 88; *VV Palmer*, The Paths to Privity: A History of Third

However, we should not lose sight of the fact that the Common Law does recognise certain exceptions to the privity doctrine. First, where loss results from a breach of a contract between D and E, but the loss has somehow (wholly or partly) 'transferred' to F, the Common Law has accepted that there is a legal 'black hole'[34] that must be addressed. This is achieved via 'the transferred loss doctrine', which attempts to limit or remove the effects of the black hole by allowing contracting party D to advance a claim against E in respect of F's loss under the contract between D and E, notwithstanding that F is not a party to it.[35] Likewise, the doctrine of undisclosed agency also amounts to an exception to the doctrine of privity of contract. Here, on the instructions of the principal, an agent fails to disclose his/her office to a third party, in which case the third party does not know or believe him/her to be acting for a principal, whose identity is never revealed to the third party. When the agent enters into a contract with the third party, notwithstanding the privity of contract doctrine, the law of agency in Common Law systems recognises that the principal is bound by the contract with the third party and can be sued by the third party under that contract or sue the third party him/herself.[36] Another illustration of an exception to privity is provided by the doctrine of 'contracts for the benefit of another'. This doctrine provides that where a contract is entered into between A and B for the benefit of C, A may recover damages from B in respect of C's losses resulting from B's defective contractual performance. As such, C has no legal right to recover a remedy, but one of the contracting parties A can do so on his/her behalf.[37] Finally, there are numerous statutory

Party Beneficiary Contracts at English Law (1992) 7; *M Furmston/GJ Tolhurst*, Privity of Contract (2015); *J Baker*, Privity of Contract in the Common Law before 1680, in: EJH Schrage (ed), Ius quaesitum tertio (2008) 35 at 35.

34 *J Dykes Ltd v Littlewoods Mail Order Stores Ltd*, 1982 Scots Law Times (SLT) 50, 54 per Lord Stewart.

35 See *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518; *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Grou*p, 2003 Scottish Civil Law Reports (SCLR) 323, para 33 per Lord Drummond Young; *J Dykes Ltd v Littlewoods Mail Order Stores Ltd*, 1982 Session Cases, House of Lords (SC (HL)) 157, 166 per Lord Stewart; *Axon Well Intervention Products Holdings v Michael Craig* [2015] Scotland Court of Session, Outer House (CSOH) 4, para 29 per Lord Doherty; *The Most Honourable Alexander George Gordon, Marquess of Aberdeen and Temair v Messrs Turcan Connell*, 2008 CSOH 183, para 45 per Lady Smith; *G Jackson*, The Laws of Scotland: Stair Memorial Encyclopaedia: Obligations: Contract, vol 15 (1995) (hereinafter SME) para 158; *M Hogg*, Obligations (2nd edn 2006) 3.174.

36 *Hutton v Bulloch* (1874) Law Reporter (LR) 9 Queen's Bench (QB) 572; *Thomson v Davenport*, 1829 9 Barnewall & Cresswell's King's Bench Reports (B & C) 78; *Bennet v Inveresk Paper Co*, 1891 18 Rettie 975.

37 *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 at 1473 per Lord Denning.

exceptions, where the privity doctrine is disposed of on the basis of certain policy considerations.[38]

Recent scholarship has demonstrated that each of these exceptions are reflective of a variety of policy factors.[39] Three of these policy factors are particularly powerful. First, where the third party C is physically or financially weak, C's loss was reasonably foreseeable to the contracting parties A and B, and C could not reasonably have been expected to protect him/herself in advance, there is a weighty case for the privity doctrine to give way in favour of the protection of that weaker third party C.[40] Likewise, where it is felt that there is a pressing case for the third party C to be entitled to recover the loss he/she has suffered as a result of a contractual breach.[41] Finally, an exception to the privity doctrine will be justified where it is a matter of commercial necessity or convenience.[42] Bearing these policy considerations in mind, we must ask whether contract law in England, Wales and Scotland ought to be refined so that privity is bypassed to offer C relief from TNC A where A has entered into a contract with its overseas subsidiary B1 or overseas supplier BA1, contractor BB1, or sub-contractor BC1.

On balance, there may be a case to do so on the basis of the first policy factor, ie that the third parties C are physically or financially weak, their loss was reasonably foreseeable to the contracting parties TNC A and its subsidiary B1 or overseas supplier BA1, contractor BB1, or sub-contractor BC1, and the claim that C could not reasonably have been expected to protect themselves in advance is undoubtedly plausible. The main obstacle, therefore, concerns the question of reasonable foreseeability of C's loss. On the one hand, one can argue that it is reasonably foreseeable that a failure on the part of subsidiary B1 or overseas supplier BA1, contractor BB1, or sub-contractor BC1 to adhere to the labour standards and human rights obligations in the contractual Code of Conduct will give rise to loss sustained by C. On the other hand, it is not a foregone conclusion that injured workers or citizens such as C could not have taken active steps to protect themselves from their injuries in advance, eg through insurance or subsidiary B1, supplier BA1, contractor BB1, or sub-contractor BC1 procuring insurance cover for

38 Married Women's Property Act 1882, Carriage of Goods by Sea Act 1992, Third Parties (Rights against Insurers) Act 2010, Defective Premises Act 1972, Latent Damage Act 1986, Fire Prevention (Metropolis) Act 1774, Consumer Protection Act 1987 Part I and the Package Travel and Linked Travel Arrangements Regulations 2018 (SI 2018/634).

39 See unpublished thesis by *L MacFarlane*, Privity and Exceptions to Privity in Scots Private Law: A New Taxonomy (July 2018, on file with author).

40 See unpublished thesis by *L MacFarlane*, Privity and Exceptions to Privity in Scots Private Law: A New Taxonomy (July 2018, on file with author) 282.

41 See ibid.

42 See ibid.

their express benefit. Another possibility is that third party beneficiary theory could be adapted to offer C some relief under the contract concluded between TNC A and its subsidiary B1 or overseas supplier BA1, contractor BB1, or sub-contractor BC1. In fact, English law and Scots law both recognise the concept of a *jus quaesitum tertio*, as enshrined in the Contracts (Rights of Third Parties) Act 1999 and the Contract (Third Party Rights) Scotland Act 2019. As such, there should be some potential for third parties such as C to obtain a remedy. However, the main difficulty with this line of argument is that it is routine legal practice in the UK for commercial contracts to exclude the possibility of third party rights. Even more important is the fact that a third party such as C will be denied relief if they are not specifically named in the contract or a description provided of the class or group of person to which C belongs.[43] For obvious reasons, it is unlikely that the Code of Conduct incorporated into the contract between TNC A and its subsidiary B1 or overseas supplier BA1, contractor BB1, or sub-contractor BC1 will have done so, for the principal reason that such a voluntary course of action will explicitly open up TNC A to liability to C. Why would TNC A take, or its legal advisers recommend, such a counter-intuitive step?

C Private international law

Notwithstanding each of the difficulties versed above, even if it is the case that C is able to establish a claim in English or Scots tort/delict or contract law against TNC A for the actions of its subsidiary B1 or overseas supplier BA1, contractor BB1, or sub-contractor BC1, there are still hurdles in private international law which must be overcome. In effect, C must demonstrate that the courts in England, Wales or Scotland have jurisdiction to hear their claim against A. Secondly, C must also persuade the court that the proper law applying to the tortious or contractual dispute ought to be English or Scots law.

If we turn first to the rules of private international law that are in play where there is a question of jurisdiction of the English, Welsh or Scots courts in a tortious dispute, the Brussels I Recast Regulation will apply.[44] Article 4 of the Brussels I Recast Regulation dispenses with the plea of *forum non conveniens* by providing that jurisdiction in tort is to be governed by the domicile of the defendant

43 Contracts (Rights of Third Parties) Act 1999 sec 1(3) and Contract (Third Party Rights) Scotland Act 2019 sec 1(3).

44 Parliament and Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] Official Journal (OJ) L 351/1.

A. In the case of TNC A, that will be its registered office or place of incorporation. For a recent example of the application of art 4, *Vedanta* is a case in point. Here, toxins from a copper mine were discharged into a watercourse in Zambia. Various Zambian citizens were injured and sued both the Zambian subsidiary of a parent company incorporated in England and the parent itself, in the English courts. The Supreme Court ruled that art 4 permitted the English courts to establish jurisdiction in respect of the parent company registered in England and that this was not an abusive application of EU law. In addition, it was also held that each of the defendants, including the Zambian defendants, could be sued in England, since the risk that substantial justice would not be obtained in Zambia was high enough that it was justified for the English courts to have jurisdiction. As for whether the relevant jurisdiction will be the home state of TNC A in England where the legal dispute is based on contract law, art 25 of the Brussels I Recast Regulation on the prorogation of jurisdiction will assume importance. In essence, this article preserves the right of the parties to enter into a choice-of-court arrangement in their commercial contract. While it is absolutely certain that TNC A and B1, BA1, BB1 or BC1 will insert a clause prorogating jurisdiction in their contract, the likelihood, however, that TNC A would specify England, Wales or Scotland as the appropriate jurisdiction for the resolution of any contractual dispute it may have with its subsidiary B1 or overseas supplier BA1, contractor BB1, or sub-contractor BC1, is very low. For that reason, as a matter of practical reality, the scope for the English, Welsh or Scottish courts to have jurisidiction over the dispute is, once again, limited.

In the unlikely scenario that the English courts do have jurisdiction to hear the evidence in the tortious or contractual dispute, there are certain practical challenges that must be overcome. Leaving aside the question of the wisdom and cost of transferring the written evidence and transporting the relevant witnesses all across the world from Ruritania to the UK, there is the issue of the governing law to be applied in the English, Welsh or Scottish courts. Should the proper law be English law/Scots law, or the law applicable in the jurisdictions where C are/were resident? Here, we must resort to the detail of the Rome I and Rome II Regulations,[45] which cover the proper law to be applied to contractual and non-contractual disputes. The Rome II Regulation identifies the governing law in the case of a tortious dispute between TNC A and the injured workers or citizens C. Article 4(1) prescribes the general rule that the governing law in tort will be the law of

45 Parliament and Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations [2008] OJ L 177/6 (Rome I Regulation) and Parliament and Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations [2007] OJ L 199/40 (Rome II Regulation).

the country in which the damage occurred, irrespective of the country in which the event giving rise to the damage occurred. As such, if C are injured in Ruritania and the English or Scottish courts are seized of jurisdiction to hear the dispute, they will be bound to apply the tort law of Ruritania, ie the *lex loci delicti*. However, art 4(1) is a provision that does admit of exceptions. As such, it is subject to two principal carve-outs. First, the law of another country will apply if the TNC A and C have their habitual residence in the same territory.[46] For obvious reasons, that is of scant import in the paradigm example we painted in section II above. However, the second exception may hold more relevance. Here, it is provided that where the damage or injury caused to C is manifestly more closely connected with another country, the law of that other country will apply to the dispute.[47] The relevant article in the Rome II Regulation goes on to provide illustrations as to when such a manifestly closer connection might arise. For example, where there is a pre-existing relationship between the TNC A and C established under a contractual agreement, that will suffice. In the case at hand, it is stretching matters to conceive of a situation in which C would have ever been in some form of prior contractual arrangement with TNC A before the onset of any illness, injury or fatality. To that extent, once again, the capacity of a law other than the law of Ruritania to assume any relevance in any tortious dispute is slim to zero.

We now turn to consider the relevance of the Rome I Regulation. Of course, here we are operating on the arguably contestable basis that C may have the potential to harness some exception to the privity doctrine, such as a third party right, to exert a claim in contract against TNC A pursuant to the contract concluded between TNC A and its overseas subsidiary B1, or one of its suppliers BA1, contractors BB1 or sub-contractors BC1, located in Ruritania, in the global supply chain management context. Article 3(1) of the Rome I Regulation provides that where C is seeking to rely on the terms of such a commercial contract entered into between TNC A and its overseas subsidiary or supplier, contractor, or sub-contractor, then the applicable law govering the contractual dispute is the law chosen in the contract itself. What is a commercial certainty is that on the recommendation of its professional advisers, TNC A will have inserted a governing law clause in that contract. However, although a possibility, the prospect that TNC A will have picked the law of Ruritania to govern any disagreements it may have with its subsidary B1, supplier BA1, contractor BB1 or sub-contractor BC1, is far from assured. For that reason, there is restricted scope for C to obtain relief based on the English or Scots law of contract, and even if the jurisdiction of the English or

46 Article 4(2) of the Rome II Regulation.

47 Article 4(3) of the Rome II Regulation.

Scottish courts is established, C will have no option but to fall back on the law of Ruritania, which as noted above, is likely to be under-developed and offer limited rights of recourse.

D Summary of principal legal challenges

The combination of English/Scottish tort/delict law, contract law, company law and private international law amounts to a toxic mix that will inevitably present a formidable hurdle to C obtaining any form of compensatory relief from TNC A in its home state in the UK. This leads us to question whether there are potential additional options entailing the evolution of existing rules in the private law doctrine of the UK, or otherwise. It is this question we cover in the following section IV.

IV Potential future approaches

There are a number of possible adaptations of existing private law doctrine – some admittedly more theoretical than others – that might achieve the desired policy of closing the TNC A accountability gap. The first that comes to mind is the concept of dual liability, which has been recognised in English tort law. This has arisen within the specific context of the identification of the appropriate party for the imposition of vicarious liability where an employee is 'borrowed' from another employer and owing to the fault of that employee, a third party suffers loss. In the case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*,[48] the English Court of Appeal decided that there was no precedential or conceptual impediment to English law accepting that dual vicarious liability could be imposed on two employers. Lord Justice May opined that such dual liability would arise where it could be established that both parties exercised dual control over the employee.[49] However, whilst not discounting the relevance of evidence of shared control, Lord Justice Rix preferred a broader test for the recognition of dual liability, which he conceived of as arising where the employee was so much part of or integrated into, the work, business, or organisation of both employers that it was just to make both employers answer for his negligence.[50] Whether such dual

48 [2005] EWCA Civ 1151, [2006] QB 510.

49 [2005] EWCA Civ 1151, [2006] QB 510, 519E-527H per May LJ.

50 [2005] EWCA Civ 1151, [2006] QB 510, 536E-537E per Rix LJ. See also the discussion in *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18, [2006] paras [82]–[86] per Hallett LJ.

control or integration arises will be based on a forensic factual investigation as to how responsbility for the various functions giving rise to the risks and damage caused has been parcelled out or shared by the two relevant legal entities. By abstracting these rules which delimit the scope for dual liability from their source in the norms regulating the law of vicarious liability and the borrowing of employees, and then harnessing their application within the not dissimilar context of the TNC A accountability gap described in this article, it would not entail an excessive stretching of the existing private law doctrine to create the potential for both TNC A and its overseas subsidiary B1 or supplier BA1, contractor BB1 or sub-contractor BC1 to be held liable to C. The principal difference would be that rather than vicarious liability being borne by TNC A for the negligent conduct of its employees or the employees of its overseas subsidiary B1 or supplier BA1, contractor BB1 or sub-contractor BC1, instead, the rules would be refined to impose dual primary or vicarious liability on TNC A and B1, BA1, BB1 or BC1 for the activities or decisions of B1, BA1, BB1 or BC1 where such conduct is the foundation of the injuries to the employees C of B1, BA1, BB1 or BC1. Of course, based on the existing rules in the law of vicarious liability, such dual liability would only emerge if both TNC A and B1, BA1, BB1 or BC1 shared control over the injured employees C, or it was possible to demonstrate that C was sufficiently integrated into the commercial operations of both TNC A and B1, BA1, BB1 or BC1. However, the difficulty is that certain pragmatic factors will marr the potential for such an adaptation to be successful. For the reason that TNC A will routinely arrange its commercial affairs in a manner which keeps both B1, BA1, BB1 or BC1 and C at a lengthy distance, even such a doctrinal refinement is unlikely to hold much promise as regards the filling of the TNC A accountability gap. In other words, the relevant tests attaching to the new legal position would be problematic to the extent that they would merely serve to derive a normative proposition that both TNC A and overseas subsidiary B1 or supplier BA1, contractor BB1 or sub-contractor BC1 *ought to be* liable where they either (i) exercise dual control over the activities of the injured employees or citizens C, or (ii) the latter are integrated into the organisational and commercial structures of both TNC A and B1, BA1, BB1 or BC1, from a descriptive reality, ie that both TNC A and B1, BA1, BB1 or BC1 *are liable* because both (i) and (ii) are satisfied. TNC A may simply avoid the operation of the normative rule that it will be liable by easily modifying the factual position on the ground, so that the requisite level of integration or control is absent.[51]

51 A similar concern has been expressed about the normative reformulation put forward by Prassl in *J Prassl*, The Concept of the Employer (2015): see *H Collins*, A Review of the Concept of the Employer by Dr Jeremias Prassl, available at <https://www.law.ox.ac.uk/content/labour-law-0/blog/2015/11/review-concept-employer-dr-jeremias-prassl>.

Perhaps an alternative mechanism may exist that can plug the TNC A accountability gap. One candidate which presents itself is 'network liability'. This would involve the ascription of legal recognition to what has hitherto, in the large, been a theoretical concept discussed in the academic literature by scholars. The main proponent of network theory is Prof Gunther Teubner.[52] It entails the imposition of liability on an identifiable legal person or persons where a variety of autonomous economic entities are bound together via a chain consisting of a cluster of interconnected contracts. What binds the network together is mutual co-operation and a common commercial enterprise or objective. For obvious reasons, the notion of 'network liability' is a particularly germane notion to capture the crystallisation of liability where a string of contracts are entered into between a number of separate legal entities operating along a vertically disintegrated supply chain. However, it is not confined to supply chain management arrangements, since it is equally of relevance to distribution, producer and franchise networks, as well as corporate group arrangements.

The fundamental purpose of network liability theory would be to ensure that parties in the chain are held accountable where a wrong is done to a third party such as an injured employee, citizen or consumer C. However, the main challenge presented by network liability theory is the problem of boundaries. What is abundantly clear is that the boundaries have to be identified in a way that ensures not all of the parties in the network are liable where only one of the parties has committed an actionable wrong in contract or tort law, eg if TNC A enters into commercial contracts with overseas suppliers BA1, BA2, BA3, BA4, BA5, and the employees of BA2 are injured owing to the conduct of BA2, it would be wrong to impose *horizontal* liability on BA3, BA4 or BA5 if they are not directly responsible for the relevant loss. However, it may be justifiable to impose *shared vertical* liability on TNC A and BA2 in such circumstances. The difficulty with recognising a system of liability all along and up and down the supply chain is that the remedial scheme will likely lack legitimacy. It is not always an easy choice to identify where such supply chain network liability should begin and end, eg under what kind of circumstances might it be appropriate to impose shared liability on TNC A,

52 *G Teubner* (eds), Networks: Legal Issues of Multilateral Cooperation (2009); *G Teubner*, Networks as Connected Contracts (2011); *G Teubner*, 'And if I by Beelzebub cast out Devils, …': An Essay on the Diabolics of Network Failure (2009) 10(4) German Law Journal 395; *H Collins*, Introduction, in: G Teubner, Networks as Connected Contracts (2011) 1; *WW Powell*, Neither Market nor Hierarchy: Network Forms of Organization (1990) 12 Research in Organizational Behaviour 295; *RM Buxbaum*, Is 'Network' a Legal Concept? (1993) 149(4) Journal of Institutional and Theoretical Economics 698; *R Brownsword*, Contracts in a Networked World, in: LA DiMatteo/Q Zhou (eds), Commercial Contract Law: Transatlantic Perspectives (2013) 116.

BA2 *and* BA3, BA4 and/or BA5 in the example given. Seen from that perspective, where a series of parties are horizontally and vertically engaged in a common enterprise, there is not necessarily a doctrinal solution to whether network liability should be restricted to vertical liability up and down the supply chain, or whether it should also encompass the ascription of legal exposure horizontally.

A concept similar to 'network liability' has recently been put forward by Ulfbeck in this journal, namely 'production liability'.[53] Such a form of legal exposure would involve the imposition of liability on TNC A in the context of global supply chain management for the negligent actions of its suppliers BA1, contractors BB1, or sub-contractors BC1. Its primary justification is rooted in the 'reasonable expectations' of the employees of the suppliers BA1, contractors BB1, or sub-contractors BC1. It would operate as a counterpart to product liability insofar as the notion of 'cheapest cost avoider' equally applies to TNC A as the best party to shoulder and absorb the risks and costs associated with the commercial operations that are ongoing across the supply chain: TNC A 'distributes risk[s] by setting the prices of the product in the buyer driven [supply] chain…'.[54] Such a development would likely require Parliamentary intervention in the guise of legislation, and as such, like network liability, it is nothing more than a mere possibility at this stage of discussion.

Perhaps another option that is available to fill in the TNC A accountability gap lies in the imposition of extra-territorial criminal liability under the criminal law, rather than tinkering around at the edges (or heart) of existing private law doctrine. In fact, there is already a precedent for marshalling the criminal law in the guise of sec 7 of the Bribery Act 2010. Here, it is provided that a company such as TNC A will be held criminally liable if a person B who is associated with it engages in bribery intending to retain or win business for TNC A, or obtain or retain an advantage in the conduct of business for TNC A. The fundamental point, however, is that the bribery or corruption may take place overseas, since it is sufficient if B would be gulty of an offence under secs 1 to 6 of the Bribery Act 2010 which may occur anywhere on planet earth. If we consider the current statutory policy initiatives to counter the TNC A accountability gap in the context of the abuse of human rights or labour standards, rather than specifically impose statutory duties, which if breached, would render corporations such as TNC A statutory liable in private law, Parliament has restricted itself to the imposition of mandatory corporate reporting obligations and human rights/labour standards due dili-

53 *V Ulfbeck*, Supply Chain Liability for Workers' Injuries – Lessons to be Learned from Product Liability (2018) 9 Journal of European Tort Law (JETL) 269.

54 *Ulfbeck* (2018) 9 JETL 269, 287.

gence obligations. The classic illustrations in the UK are sec 54 of the Modern Slavery Act 2015 and secs 414CA to 414CB of the Companies Act 2006, each of which demand that qualifying corporations such as TNC A either (1)(a) investigate and disclose their activities and those of their overseas subsidiaries and supply chain partners in respect of the prevention of slavery and human trafficking,[55] or (b) explain that they have failed to undertake such steps,[56] and (2) specify information to the extent necessary to enable outsiders to understand their development, performance and position and the effect of their activities affecting the outside world, including the environment, their employees, social issues, respect for human rights and anti-corruption and bribery matters.[57] At present, sec 54(11) of the Modern Slavery Act 2015 prescribes that it is only the Secretary of State who has the power to bring civil proceedings where a qualifying corporation fails to comply with its statutory reporting obligations in these terms, and the remedy is limited to an order or decree of injunction/interdict or specific performance/implement. However, in practice, the UK Government has adopted a laissez-faire approach and been reluctant to use these powers, relying on consumers, investors and Non-Governmental Organisations to investigate whether there has been compliance and apply pressure on businesses.[58] A more innovative solution to the TNC A accountability gap – which would reflect broader policy concerns expressed at the outset of this article about the conduct of multinational companies registered in the UK – would simply involve the extension of extraterritorial criminal liability to TNC A for a breach of such statutory reporting and due diligence obligations. This would entail a straightforward modification of sec 54 of the Modern Slavery Act 2015 along the lines of sec 8 of the Bribery Act 2010. But more symbolically, it would immediately transform the legal position from one reflecting a somewhat trite exercise in incentivising disclosure and enhanced transparency to one that possesses real teeth designed either to prevent or punish human rights or labour standards abuses. The irony is that the most recent report on the operation of the Modern Slavery Act 2015 stopped short of recommending such a reform.[59] Instead, its proposals were somewhat anaemic as they were limited to extending the statutory obligation in sec 54 to public sector organisations and a suggestion that the legislation be changed to remove the ability of a qualifying

55 Modern Slavery Act 2015, sec 54(4)(a).

56 Modern Slavery Act 2015, sec 54(4)(b).

57 Companies Act 2006, secs 414CA and 414CB.

58 See Home Office, Transparency in Supply Chains etc. A practical guide (2015) 6.

59 See Independent Review of the Modern Slavery Act 2015, May 2019, CP100, available at <file:///D:/Tort%20Law%20Vienna/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf> (last visited 5 June 2019).

corporation to comply simply by saying that it had not carried out any steps to prevent human trafficking or slavery.[60]

V Conclusion

As demonstrated by this article, the current private law doctrines recognised by the Common Law place considerable barriers in front of workers (of subsidiary companies or supply chain partners), citizens or other victims of abuses of human rights and labour standards where they are seeking to recover their losses from multinational companies located in the UK. Admittedly, there has been a degree of evolution in the legal position in tort, which may offer some scope for plugging the TNC A accountability gap. However, much developmental work in the contours of the existing doctrine remains to be done by the judiciary before a fairer distribution and allocation of liability finally emerges.

This article has probed the extent to which creative solutions could be brought to bear over the current rules of tort law, private international law, company law and contract law, but, as noted in the discussion, there are limits inherent within Common Law systems and their modes of reasoning. By their very nature, the tools at the disposal of the judiciary are restricted, which stymie the extent to which the Common Law can be harnessed to adapt existing private law doctrines in a manner which conforms to received policy expectations. The reality is that legislative action is the primary means by which law reform will be undertaken in Common Law regimes such as the UK, which itself gives rise to the additional consideration of political will. There may be the absence of such political will, owing to concerns that legislative measures designed to plug the TNC A accountability gap will generate adverse economic effects and incentives. For example, by reforming the law to make it easier to hold locally based multinationals such as TNC A to account for the torts or breaches of contract of their overseas subsidiaries or supply chain partners, the costs of doing business of such an organisation will increase. If the costs mount, TNC A may decide to relocate elsewhere, thus giving policymakers cause to question the wisdom of such legislative measures in the first place when they are initially proposed.

In the final analysis, there are clearly difficult political choices involved here, but we must not lose sight of the fact that prevention is always better than cure. In

60 See Independent Review of the Modern Slavery Act 2015, May 2019, CP100, available at <file:///D:/Tort%20Law%20Vienna/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf> (last visited 5 June 2019) 14 f, 22, 24, 41 and 44.

effect, developments such as the tightening up of legislative reporting and due diligence obligations supported by criminalisation measures will assist in that regard, eg in respect of TNC A where TNC A fails to adhere to transparency measures imposed under legislation such as the Modern Slavery Act 2015 and other labour standards.